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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 971

SUSIE ANN GRAHAM, *Petitioner*

v.

THE PENNSYLVANIA RAILROAD

and

THE WASHINGTON TERMINAL COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No.

SUSIE ANN GRAHAM, *Petitioner*

v.

THE PENNSYLVANIA RAILROAD

and

THE WASHINGTON TERMINAL COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Susie Ann Graham, your petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in the above-entitled case on December 10, 1964 and the denial of a rehearing en banc entered on February 5, 1965.

OPINIONS BELOW

The United States District Court for the District of Columbia wrote no opinion but entered its Order on March 20, 1964 (see pp. 14 and 15 of JA filed herein pursuant to rule 21). The Opinion of the United

States Court of Appeals for the District of Columbia Circuit is reproduced in Appendix A, infra, pp. A1 through A7 and its amended footnote Appendix A7. This opinion has as yet not been reported. The Judgment of the United States Court of Appeals for the District of Columbia Circuit is reproduced in Appendix B1. The denial of the petition for a rehearing en banc is reported in Appendix B2.

JURISDICTION

The judgment of the court below was entered on December 10, 1964 and the denial of the petition for a rehearing en banc was entered on February 5, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether a civil action should have been dismissed by application of the amended Federal Rules of Civil Procedure effective July 1, 1963. An application of the prior rules to the action pending when the amendments took effect would not have had such a result. The Plaintiff's lawsuit was *pending for three and one-half years prior to July 1, 1963.* The Plaintiff passed away prior to July 1, 1963 and a motion to substitute his personal representative was made well within the *two year period of death* as required by the Federal Rules of Civil Procedure in existence at the time his action was commenced and on the date of his death. The substitution occurred after the ninety day period set forth in the July 1, 1963 amendments to Rule 25(a)(1) the Plaintiff, by counsel, having filed a suggestion of death as a normal procedure in the local jurisdiction to abate a scheduled pre-trial proceeding and unknow-

ingly triggering the shortened time under the newly amended Federal Rules.

FEDERAL RULES OF CIVIL PROCEDURE INVOLVED

Rule 25(a)(1) prior to the July 1, 1963 amendments is set forth in Appendix C1, infra. Rule 25(a)(1) subsequent to July 1, 1963 is set forth in Appendix C1, infra. Rule 86 and 86(e) are set forth in Appendix C2, infra.

STATEMENT

Petitioner's decedent, David Graham, filed a personal injury action against The Pennsylvania Railroad and The Washington Terminal Company on December 9, 1959 (JA 4, 5) alleging that on January 16, 1959, David Graham suffered injuries when he slipped on accumulated ice on the steps of a train operated by The Pennsylvania Railroad as he alighted at the Union Station in Washington, D. C. The Union Station is operated by The Washington Terminal Company. After discovery proceedings were completed the cause was Certified to the Ready Calendar in April, 1962 (see docket entries JA 3). This Certification is a procedure under the local rules of the United States District Court for the District of Columbia necessary before an action may progress to the stage of the pretrial proceeding.

The cause was finally set for pre-trial on July 23, 1963. At this time David Graham's then local counsel were advised by his counsel in another city that he had on May 17, 1963 passed away. A Suggestion of Death of the Plaintiff, David Graham, was filed (JA 9), counsel moving the court below to abate the action until the proper personal representative of the decedent could be substituted (See J. Wright's dissenting opin-

ion Appendix A5, infra). Plaintiff's counsel then had the District Court strike the cause from the Ready Calendar since the death of the Plaintiff prohibited the cause from being ready for pre-trial. (See J. Wright's dissenting opinion Appendix A5-A6, infra).

On February 3, 1964, a period of less than nine months from the death of David Graham, a motion to substitute his personal representative was filed (JA 9, 10). This motion was opposed by the defendants who at the same time filed a motion to dismiss (JA 10, 11, 12) on the basis that under amended Federal Rule 25(a)(1) which had become effective on July 1, 1963, a period of forty-four days after the death of the plaintiff, such substitution was required to be made within ninety days after death is suggested on the record. Rule 25(a)(1) prior to amendment had allowed a period of two years.

The District Court denied the motion to substitute and granted the defendant's motion to dismiss (JA 14, 15). An appeal to the United States Court of Appeals for the District of Columbia Circuit resulted in an affirmance of the District Court, Wright, J., dissenting. A timely petition for a rehearing en banc was denied by a vote of six to two, Fahy, J. joining Wright, J. This Petition has followed.

REASONS FOR GRANTING THE WRIT

Petitioner here seeks to have corrected the decisions of the courts below which have hardened into precedent and left a result which is a fundamental misapplication of the Federal Rules of Civil Procedure as promulgated by this Court. In all of the amendments to the Federal Rules since their first enactment, and indeed even at that time, Rule 86 has provided a safety-

valve constituting a square of justice through which the circle of injustice should not escape. To some cases the amended rules were to apply; to others, not. See: *Ramsey, et al.* v. *Curtis*, 18[illegible] F. 2d 687 and *New Orleans PublicBelt R. Co.* v. *Wallace*, 173 F. 2d 145. The 1963 amended Rule 86, now 86(e), simply and clearly stated, provides that a litigant whose action is pending when the amended Federal Rules of Civil Procedure take effect shall *not* have those rules applied to his cause of action if they would not be feasible or an *injustice* would result. Instead, the Rules in effect at the time his action began *are* to control.

If the Federal Rules of Civil Procedure operative at the time the decedent began his cause of action and also at the time of his death had been applied by the courts below, the substitution of his Administratrix would have been allowed. *Such attempted substitution was made fifteen months before the time limit of Rule 25(a)(1) in effect at those times.* If the July 1, 1963 amendments were applied, the substitution was three and one-half months too late.

The INJUSTICE in the present case is simply stated. As a result of the misapplication of the July 1, 1963 amendments to the Federal Rules of Civil Procedure a litigant's cause of action has been finally dismissed. Such dismissal, after a court-congested wait of three and one-half years for a notice of pre-trial, has come before a disposition of the cause of action upon its merits. A proper application and a clearly-merited interpretation by the courts below of Rule 86(e) would not have abruptly terminated this litigation.

This Court has recently indicated a preference for disposition of litigation on the merits of the cause:

> "It is too late in the day and entirely contrary to the spirit of the Federal Rules of Civil Proced-

> ure for decisions on the merits to be avoided on the basis of such mere technicalities. 'The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.' Conley v. Gibson, 355 U.S. 41, 2 L. ed. 80, 86, 78 S. Ct. 99. The rules themselves provide that they are to be construed 'to secure the just, speedy, and inexpensive determination of every action.' Rule 1." *Foman* v. *Davis,* 371 U.S. 178, 9 L. ed. 222, 225, 226, 83 S. Ct. 227 (1962).

Petitioner cannot state more clearly its case than the dissenting opinion below has done in capturing the spirit of the Federal Rules. It is irony, in its cruelest form, that the amended Federal Rules of Civil Procedure are in this cause being misinterpreted to foment the very injustice they were designed to prevent.

CONCLUSION

Petitioner asks this Court to restore the fire in the beacon light of safety which the courts below have snuffed out. Petitioner respectfully prays this Court to grant certiorari in this case.

Respectfully submitted,

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APPENDIX A

(1) Opinion of December 10, 1964

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,637

SUSIE ANN GRAHAM, *Appellant*,

v.

THE PENNSYLVANIA RAILROAD AND
THE WASHINGTON TERMINAL COMPANY, *Appellees*.

Appeal from the United States District Court
for the District of Columbia

Decided December 10, 1964

Mr. Melvin Hirshman, with whom *Mr. Earl H. Davis* was on the brief, for appellant.

Mr. Stephen A. Trimble, with whom *Mr. Thomas A. Flannery* was on the brief, for appellees.

Before WILBUR K. MILLER, Senior Circuit Judge, and WRIGHT and MCGOWAN, Circuit Judges.

PER CURIAM: This action in tort was pending on July 1, 1963, when certain amendments to Rule 25(a)(1) of the Federal Rules of Civil Procedure became effective. The effect of these changes was to require, as to a deceased party, dismissal of an action unless a motion for substitution is filed within 90 days after a suggestion of death is made upon the record. In this case, plaintiffs'

counsel were advised on or about July 23, 1963, that plaintiff David Graham had died on May 17, 1963. Plaintiffs' counsel thereupon filed a formal suggestion of such death in the District Court on July 24, 1963. On February 3, 1964—somewhat in excess of six months later—counsel filed a motion to substitute appellant administratrix (known by such counsel on July 30, 1963 to have been appointed) for the deceased plaintiff. Defendants, on February 7, 1964, filed an opposition to the motion and a motion to dismiss, founded upon the lack of timeliness under Rule 25(a)(1). A few days later appellant moved under Rule 6(b) to enlarge the time period fixed in Rule 25(a)(1). After a hearing on March 17, 1964, the District Court denied appellant's motions and dismissed the complaint.

In the view we take of the case, we address ourselves only to the issue of whether the District Court abused its discretion under Rule 6(b) in failing to enlarge the 90-day period. That this power to enlarge is committed to the court's discretion "for cause shown" is explicit in the language of the Rule itself and in the Advisory Committee's note to it. In the papers constituting the record before the District Judge, the only "cause shown" as excusing the neglect is the statement in the Points and Authorities supporting the motion to enlarge that "counsel frankly was unaware of the change due to his rules service not being up to date"; and that "Since July 30, 1963, counsel has been engaged in the preparation of seven appellate cases in the U. S. Court of Appeals, and D. C. Appeals, in addition to preparation for trial of an extensive Federal Tort Claims Act case, and other cases." We cannot say that, on this showing, the District Court abused its discretion to a degree warranting corrective intervention by us.

In oral argument before us, we were strongly urged to reverse the District Court for the reason that lawyers

should be given time to become aware of rule changes.[1] But it is not as if no such time had been provided. The amendments which became effective in 1963 were widely circulated in 1961. They were adopted by the Supreme Court on January 21, 1963 to become effective the following July 1. In that interim they were published in the official reports, and discussed in the treatises and legal periodicals. We think the Supreme Court expected lawyers with any serious pretensions to practice in the federal courts to become familiar with rule changes on or shortly after their effective date. That expectation was not, under the circumstances, irrational or arbitrary in the large, and we do not reverse the District Court for its recognition of it in this particular instance.

Affirmed.

WRIGHT, *Circuit Judge, dissenting:* This action was filed in the District Court on December 9, 1959. It did not reach the pre-trial stage until July of 1963, at which time plaintiffs' counsel filed a statement suggesting the death of plaintiff David Graham on May 17, 1963, and moving for a delay in the proceedings until a personal representative

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[1] The availability, asserted in the dissent, of Rule 86(e) for appellant's relief stands sharply in contrast to her failure to rely upon it, either in the District Court or before us. We would have thought, as perhaps counsel did also, that Rule 86(e) is addressed to those many unanticipated exigencies in respect of which the Supreme Court has not, elsewhere in the Rules, fashioned specific measures of relief, with explicit standards for their application. In the case of a failure to observe the 90-day time limit in Rule 25(a)(1), the District Court, in Rule 6(b), is given a discretion to afford relief upon a showing of excusable neglect. As its date indicates, *New Orleans Pub. Belt R.R. v. Wallace*, 173 F.2d 145 (5th Cir. 1949), did not involve the particular Rules with which we are concerned here, nor did it present a situation in respect of which a precise avenue of escape had been provided elsewhere in the Rules.

was qualified. On February 3, 1964, the administratrix of Graham's estate moved to be substituted for him in these proceedings. On February 7, 1964, the defendants opposed the motion to substitute and moved to dismiss the action as to David Graham under the July 1, 1963 amendment to Rule 25, FED. R. CIV. P., on the ground that 90 days had elapsed since the filing of the suggestion of death. The District Court granted this motion without stating reasons.

For me, it is not necessary to divine why the District Court granted the motion to dismiss, or to determine whether, under Rule 6(b)(2), FED. CIV. P., the failure of counsel for Graham to act within the time prescribed by the amendment was the result of excusable neglect. When Rule 25(a)(1) was amended,[1] Rule 86(e), FED. R. CIV. P., was added to the Rules. It provides that the July 1, 1963 amendments will "govern • • • all further pro-

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[1] The amendment to Rule 25(a)(1) was promulgated to prevent the automatic, and often unjust, dismissal of cases where a party plaintiff has died. The Notes of the Advisory Committee on the 1963 Amendment to Rule 25(a)(1) (1963) indicate:

> "Present Rule 25(a)(1), together with present Rule 6(b), results in an inflexible requirement that an action be dismissed as to a deceased party if substitution is not carried out within a fixed period measured from the time of the death. The hardships and inequities of this unyielding requirement plainly appear from the cases. See, e. g., Anderson v. Yungkau, 329 U.S. 482, 67 S.Ct. 428, 91 L.Ed. 436 (1947); Iovino v. Waterson, 274 F.2d 41 ([2d Cir.] 1959), cert. denied, [*sub nom.*] Carlin v. [I]ovino, 362 U.S. 949, 80 S.Ct. 860, 4 L.Ed.2d 867 (1960); Perry v. Allen, 239 F.2d 107 (5th Cir. 1956); Starnes v. Pennsylvania R. R., 26 F.R.D. 625 (E.D. N.Y.), aff'd per curiam, 295 F.2d 704 (2d Cir. 1961), cert. denied, 369 U.S. 813, 82 S.Ct. 688, 7 L.Ed. 2d 612 (1962); Zdanok v. Glidden Co., 28 F.R.D. 346 (S.D.N.Y.1961). See also 4 Moore's Federal Practice ¶ 25.01[9] (Supp.1960); 2 Barron & Holtzoff, Federal Practice & Procedure § 621, at 420-21 (Wright ed. 1961)."

ceedings in actions then pending, except to the extent that in the opinion of the court their application in a particular action pending when the amendments take effect would not be feasible or would work injustice, in which event the former procedure applies." Since applying the amendment here would work an obvious injustice, I would apply the Rule as it existed at the time of Mr. Graham's death.

When Mr. Grham died, under Rule 25(a), as it then existed, his administratix had two years in which to move to be substituted for him in these proceedings. The motion to substitute was made within this two-year period. Intervening was the July 1, 1963 amendment to Rule 25(a), which limited the substitution period to 90 days after the filing of the suggestion of death. But the filing of the suggestion of death in this case was not made pursuant to the amended Rule. Plaintiffs' counsel had no idea he was triggering the start of the 90-day period. The suggestion of death and motion for continuance was made pursuant to a practice long followed in the District of Columbia to obtain a delay in the proceedings until an administrator is appointed.[2] Plaintiffs' counsel

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[2] Although the filed statement was titled "SUGGESTION OF DEATH OF MALE PLAINTIFF IN ABOVE ACTION," it was in substance a motion for a continuance. It read as follows:

> "Comes now Earl H. Davis, Esq., of counsel for the plaintiffs in the above captioned action, and suggests to the Court that he has just been informed that the male plaintiff herein, David Graham, died in North Carolina, on or about May 17, 1963; and by reason of which fact, counsel moves the Court to abate the above action until a personal representative for said deceased plaintiff can be substituted herein."

Obviously, what counsel sought was to have the case continued, see *Annot.*, 68 A.L.R.2d 470, 531 (1959), and not to start the Rule 25(a)(1) period running against his own client. Apparently

was unaware that Rule 25(a) had been changed. And it appears that in all probability counsel for defendants suffered from the same ignorance, because instead of filing his motion to dismiss 90 days after the filing of the suggestion of death, he coupled his motion to dismiss with the opposition to the motion for substitution which was filed over six months after the filing of the suggestion of death.

Apparently, therefore, counsel for both parties, and indeed the District Court,[3] were operating under the old Rule—at least until the motion to dismiss was filed. Under that Rule the motion for substitution was timely. Under Rule 86(e), since the application of the July 1, 1963 amendment to Rule 25(a)(1) to this pending action "would work injustice," the former procedure should have been applied to the motion to substitute.[4] In any event, I would not construe plaintiffs' counsel's bumbling motion

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the District Court also thought it was merely granting a continuance. Its order read:

"ORDER STRIKING CASE FROM READY CALENDAR

"The above action having been set for pretrial on July 23, 1963, and counsel for Plaintiff having suggested the death of male plaintiff, David Graham,

"ORDERED

"That the action be and is hereby stricken from the Ready Calendar.

/s/ Edward M. Curran
JUDGE"

Ordinarily, a suggestion under the new Rule 25(a)(1) would be filed by a defending party in order to compel the attorney for the claiming party to move for substitution within 90 days. See Notes of the Advisory Committee to Rule 25 (a)(1) (1963).

[3] See Note 2 *supra*.

[4] See *New Orleans Public Belt R. Co.* v. *Wallace*, 5 Cir., 173 F.2d 145 (1949), in which the Fifth Circuit used Rule 86 to prevent an injustice caused by applying the amendment, rather than the old Rule, to pending litigation.

for a continuance as a "Suggestion of Death" in the Rule 25(a)(1) sense.

It is a cruel irony that the amendment to Rule 25(a)(1) is here being interpreted to work the injustice it was intended to prevent.[5]

(2) Order of February 24, 1965 Amending the Opinion of December 10, 1964

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
SEPTEMBER TERM, 1964

No. 18,637

SUSIE ANN GRAHAM, *Appellant*,

v.

THE PENNSYLVANIA RAILROAD AND
THE WASHINGTON TERMINAL COMPANY, *Appellees*.

Before: McGOWAN, Circuit Judge, in Chambers.

ORDER

It is ORDERED, sua sponte, that the opinion filed December 10, 1964, in the above-entitled case is hereby amended as follows:

Substitute the following in place of the first four lines of footnote 1 on page 3:

> The availability, asserted in the dissent, of Rule 86(e) for appellant's relief stands sharply in contrast to her failure to rely upon it, either in the District Court or in her brief on appeal. The claim that it should provide the basis for reversal was first advanced in oral argument before us. In any event, we would have thought, as perhaps counsel initially did also. . . [remainder of present footnote to follow unchanged.]

Dated: Feb. 24, 1965

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[5] See Note 1 *supra*.

APPENDIX B

(1) Judgment of Affirmance

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
SEPTEMBER TERM, 1964

No. 18,637

Civil 3474-59

SUSIE ANN GRAHAM, *Appellant*,

v.

THE PENNSYLVANIA RAILROAD AND
THE WASHINGTON TERMINAL COMPANY, *Appellees*.

[Filed Dec. 10, 1964]

Appeal from the United States District Court for the District of Columbia.

Before: WILBER K. MILLER, Senior Circuit Judge, and WRIGHT and MCGOWAN, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof it is ordered and adjudged by this Court that the order of the District Court appealed from in this cause be, and it is hereby, affirmed.

It is further ORDERED by the Court that each party bear its own costs on this appeal.

Per Curiam.

Dated: Dec. 10, 1964
Separate dissenting opinion by Circuit Judge Wright.

B2

(2) Order Denying Rehearing

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
SEPTEMBER TERM, 1964

No. 18,637

Civil 3474-59

SUSIE ANN GRAHAM, *Appellant,*

v.

THE PENNSYLVANIA RAILROAD AND
THE WASHINGTON TERMINAL COMPANY, *Appellees.*

[Filed Feb. 5, 1965]

Before: BAZELON, Chief Judge, and FAHY, WASHINGTON, DANAHER, BASTIAN, BURGER, WRIGHT, and MCGOWAN, Circuit Judges, in Chambers.

ORDER

On consideration of appellant's petition for rehearing *en banc,* it is

ORDERED by the Court *en banc* that appellant's petition is denied.

Per Curiam.

Dated: Feb. 5, 1965

Circuit Judges Fahy and Wright would grant appellant's petition for rehearing *en banc.*

APPENDIX C

Federal Rules of Civil Procedure Involved

Rule 25 [Prior to July 1, 1963]

SUBSTITUTION OF PARTIES

(a) DEATH

(1) If a party dies and the claim is not thereby extinguished, the court within 2 years after the death may order substitution of the proper parties. If substitution is not so made, the action shall be dismissed as to the deceased party. The motion for substitution may be made by the successors or representative of the deceased party or by any party and, together with the notice of hearing, shall be served on the parties as provided in Rule 5 and upon persons not parties in the manner provided in Rule 4 for the service of a summons, and may be served in any judicial district.

Rule 25 [subsequent to July 1, 1963]

SUBSTITUTION OF PARTIES

(a) DEATH

(1) If a party dies and the claim is not thereby extinguished, the court may order substitution of the proper parties. The motion for substitution may be made by any party or by the successors or representative of the deceased party and, together with the notice of hearing, shall be served on the parties as provided in Rule 5 and upon persons not parties in the manner provided in Rule 4 for the service of a summons, and may be served in any judicial district. Unless the motion for substitution is made not later than 90 days after the death is suggested upon the record by service of a statement of the fact of the death as provided herein for the service of the motion, the action shall be dismissed as to the deceased party.

Rule 86. Effective Date. These rules will take effect on the day which is 3 months subsequent to the adjournment of the second regular session of the 75th Congress, but if that day is prior to September 1, 1938, then these rules will take effect on September 1, 1938. They govern all proceedings in actions brought after they take effect and also all further proceedings in actions then pending, except to the extent that in the opinion of the court their application in a particular action pending when the rules take effect would not be feasible or would work injustice, in which event the former procedure applies.

(e) Effective Date of Amendments. The amendments adopted by the Supreme Court on January 21, 1963, and transmitted to the Congress on January 21, 1963, shall take effect on July 1, 1963. They govern all proceedings in actions brought after they take effect and also all further proceedings in actions then pending, except to the extent that in the opinion of the court their application in a particular action pending when the amendments take effect would not be feasible or would work injustice, in which event the former procedure applies.

BRIEF FOR THE RESPONDENT IN OPPOSITION

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THE PENNSYLVANIA RAILROAD COMPANY

and

THE WASHINGTON TERMINAL COMPANY, *Respondents*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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State v. Newman, 36 N.J.S. 506, 116 A.2d 585, 587 (N.J. Super. A.D., 1955)	6
Van Huffel v. Harkelrode, 284 U.S. 225, 229 (1931)	6
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MISCELLANEOUS:

Advisory Committee's Note accompanying 1963 amendment to Rule 25, 31 F.R.D. 638 (1963) 4

IN THE

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OCTOBER TERM, 1964

No. 971

SUSIE ANN GRAHAM, *Petitioner*

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THE PENNSYLVANIA RAILROAD COMPANY

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THE WASHINGTON TERMINAL COMPANY, *Respondents*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The Order of the United States District Court for the District of Columbia and the Opinion of the United States Court of Appeals for the District of Columbia Circuit are set forth in the petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

QUESTIONS PRESENTED

1. Whether the District Court's discretionary denial of petitioner's motions for enlargement of time (pursuant to Rule 6(b), Federal Rules of Civil Procedure) and for substitution of parties (pursuant to Rule 25(a), Federal Rules of Civil Procedure), which was of interest only to the parties, and based only upon the particular facts before it, presents a question of national importance.

2. Whether petitioner may properly assert, as a ground for the granting of certiorari, a matter which was not presented to the District Court.

FEDERAL RULES OF CIVIL PROCEDURE INVOLVED

In addition to those Rules set forth in Petitioner's Appendix C, the respondents submit Rule 6(b):

> "When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under Rules 50(b), 52(b), 59(b), (d) and (e), 60(b), and 73(a) and (g), except to the extent and under the conditions stated in them."

STATEMENT OF CASE

David Graham, petitioner's decedent, filed a common-law personal injury action against the respondents on December 9, 1959 (JA 4). On May 17, 1963, David Graham died, as was shown by the suggestion of death filed in the District Court on July 24, 1963 (JA 9). On July 30, 1963, counsel was advised of the appointment of the petitioner as the administratrix of the Estate of David Graham (JA 13).

On February 3, 1964, petitioner first moved for substitution in the place of David Graham (JA 9). On February 7, 1964, respondents filed an opposition to the motion for substitution, and also filed a motion to dismiss (JA 10, 11). On February 13, 1964, petitioner then filed a motion for the enlargement of the specified time in Rule 25, as well as an opposition to respondents' motion to dismiss (JA 12, 13, 14).

After considering the various motions, oppositions and arguments before it, the District Court entered an order denying petitioner's motion for substitution and for enlargement of time, and granted the respondents' motion to dismiss (JA 14, 15).

The disposition of the case in the United States Court of Appeals for the District of Columbia Circuit is adequately set forth in the petitioner's "Statement" (Petition 4).

ARGUMENT

I

The Decision Below is Clearly Correct

Petitioner's claim, in essence, is that the decision by the two lower Courts, based on the particular facts of this case, was erroneous. However, petitioner now seeks to change what was originally an appeal to the

discretion of the trial Court to a question of national significance by attempting to make a showing of "injustice" in the misapplication of the 1963 amendments to the Federal Rules of Civil Procedure by the failure of the trial Court to use the "safety valve" provided by Rule 86(e). As will be discussed below, the decision of the trial Court was manifestly correct based upon the facts and circumstances before it, and moreover, petitioner is not in a position to urge here the application of Rule 86(e) because of her failure to rely upon it below.

The petitioner cannot circumvent the actuality that this case turned upon its own particular facts, is of consequence only to the parties, and involves no question of national importance.

A

Petitioner Makes No Showing of an Abuse of Discretion by the District Court

Although petitioner makes no reference to the discretion of the District Court, the motions filed in that Court (for substitution of parties and for an extension of the 90-day period within which to substitute) were a direct appeal to the discretion of the Court.

Because of petitioner's failure to move for substitution within the 90-day period specified by Rule 25(a), it was necessary that she obtain an extension of this 90-day period pursuant to Rule 6(b), for, as shown by the Advisory Committee's Note accompanying the 1963 amendment to Rule 25, found at 31 F.R.D. 638 (1963), the motion for substitution may not be made after the 90-day period, unless that period is extended pursuant to Rule 6(b).

A motion for extension of time to do an act, made after the expiration of a specified time period, is addressed to the sound discretion of the District Court upon a showing of excusable neglect pursuant to the express provisions of Rule 6(b), (2).

The respondents submit that on the basis of the facts and circumstances before the District Court, no abuse of discretion was manifested. No attempt was made by petitioner to substitute during the 90-day period following the suggestion of death upon the record, although she qualified as administratrix (with counsel's knowledge) within a week of the filing of said suggestion. In fact, she made no effort for substitution until more than three months had passed *after* the last day of the 90-day time limit set by Rule 25(a).

The petitioner did not ask the District Court to exercise its discretion and invoke the "safety-valve" provision of Rule 86(e). Instead, petitioner asserted two grounds to appeal to the Court's discretion under Rule 6(b): First, her counsel was unaware of the change in Rule 25(a) due to his rules service not being up to date; and second, her counsel had been engaged with other cases (JA 13, 14).

District of Columbia law has established that counsel being engaged professionally in other matters does not constitute excuse for neglect. *Maghan* v. *Young,* 80 U.S. App. D.C. 395, 154 F. 2d 13 (1946) and *Citizens' Protective League* v. *Clark,* 85 U.S. App. D.C. 282, 178 F. 2d 703 (1949). As to counsel's unawareness of the changes in the Federal Rules of Civil Procedure, the language of the United States Court of Appeals in its decision below is most appropriate (See petitioner's Appendix A1, pages A2, A3).

Other jurisdictions, federal and state, do not excuse neglect on the basis of ignorance of rules changes. See *Ohliger* v. *United States,* 308 F. 2d 667 (2nd. Cir., 1962), and *State* v. *Newman,* 36 N.J.S. 506, 116 A. 2d 585, 587 (N.J. Super. A.D., 1955).

It is thus submitted that the District Court's decision, based upon the appeal made by petitioner to its discretion, was not erroneous.

B

Petitioner Did Not Rely Upon Rule 86(e) in the District Court

Petitioner's reliance on Rule 86(e) was not made to the District Court. As shown by the record, and reflected in the opinion of the Court of Appeals below, the papers in the District Court (JA 9-14) are totally devoid of any reference to the applicability of Rule 86(e).

This Court has held in the past that a party may not seek review on a theory which was not advanced below. *Virginian Ry.* v. *Mullens,* 271 U.S. 220, 227 (1926). This rule has been followed in the District of Columbia. *Carr* v. *Shifflette,* 65 App. D.C. 268, 82 F. 2d 874 (1936). This Court has followed a long established policy of not considering issues not presented below. See *Van Huffel* v. *Harkelrode,* 284 U.S. 225, 229 (1931), *McGrath* v. *Manufacturers Trust Co.,* 338 U.S. 241, 249 (1949) and *Nelson* v. *County of Los Angeles,* 362 U.S. 1, 9 (1960).

Moreover, not only did petitioner fail to rely upon Rule 86(e) in the District Court, ***but she affirmatively acquiesced in the applicability of the 90-day time limit provided by the 1963 amendment*** to Rule 25(a), the effect of which she now seeks to avoid.

In the District Court, respondents asserted the applicability of the 90-day limit for substitution as provided by the 1963 amendments to Rule 25(a) (JA 11, 12). Petitioner, instead of contesting the applicability of the 90-day period on the basis of Rule 86(e), specifically asked the District Court for an enlargement of the "specified time under Rule 25" (JA 12). Petitioner made further reference to the 1963 amendment to Rule 25(a) (JA 13) and, in fact, *suggested to the District Court that the 90-day provision appeared to be self-executing* (JA 14).

The respondents submit that on the basis of the record, it is manifest that petitioner not only failed to assert Rule 86(e) in the District Court, but affirmatively acquiesced in the application of the 90-day time limit set by the 1963 amendment to Rule 25(a).

If the petition in this case were to be granted, it would invite the future filing of petitions in a vast number of cases of importance only to the particular litigants, involving only the review of discretionary decisions of the District Courts, and lacking of all general or national significance or interest. Also invited would be those litigants who, having failed in the trial Courts, would feel free to raise new theories and issues, notwithstanding their acquiescence with Rules, Statutes, or case law in the trial Court. The respondents submit that the certiorari jurisdiction of this Court should not be used for this purpose.

II

There Are No Special Important Reasons for Granting the Writ of Certiorari

Notwithstanding the fact that petitioner has failed to present any constitutional question, failed to show any conflict of decisions, and failed to show that an important question of federal law is involved, she argues that an injustice resulted "as a misapplication of the July 1, 1963 amendments to the Federal Rules of Civil Procedure". This argument is made here despite the fact that petitioner never urged this argument in the District Court, and in fact, affirmatively acquiesced to the application of the 1963 amendment.

Petitioner fails to recognize the discretionary function of the trial court, particularly on her motion for extension of time pursuant to Rule 6(b). As has been earlier noted, the United Stataes Court of Appeals below was well aware of the District Court's discretionary power, as well as its own function of review to determine if there had been an abuse of that discretion (Petitioner's App. A1-A6).

Petitioner does not aid her cause by her reference to *Foman* v. *Davis*, 371 U.S. 178 (1962). In that case, this Court was dealing with technical missteps concerning the timely filings of notices of appeal, and did not concern itself with a situation of neglect such as the instant case, where the petitioner did nothing to secure the relief she desired, and then, after the specified time had long since elapsed, failed to show any adequate excuse for her neglect.

This case is of no importance save to the parties. It concerns no national issue. It involves a discretionary decision based upon the particular facts involved and

will not serve as a precedent. Once concluded, it will lack further significance. A grant of the writ of certiorari here would only invite lawyers to seek review of the thousands of discretionary rulings made by the District Courts under the Federal Rules of Civil Procedure, changing their grounds and theories as they pass each stage of appellate review. Members of this Court have noted that "the litigous tendency of our people and the unwillingness of litigants to rest content with adverse decisions after their cause has been litigated in two and often in three Courts, lead to attempts to get a final review by the Supreme Court in literally thousands of cases which should never reach the highest Court of the land". See Mr. Justice Frankfurter, dissenting in *Dick* v. *New York Life Insurance Co.*, 359 U.S. 437, at 459 (1959). The respondents submit that this is such a case.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

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